

February 4, 1999

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**DECISION ON AN APPEAL FROM ZONING VARIANCE DECISION**

**SUBJECT:** Department of Development and Environmental Services File No. **L97VA003**

**EUGENE MOREL**  
Zoning Variance Decision Appeal

Location: 2931 East Lake Sammamish Parkway Southeast

Applicant/  
Appellant: Eugene Morel, *represented by* **Joel Haggard**, Attorney At Law  
1200 Fifth Avenue #1200, Seattle, WA 98101  
Telephone (206) 682-5635 Facsimile (206) 623-5263

Department: Department of Development and Environmental Services, *represented by*  
**Sheri Sabour**, Land Use Services Division  
900 Oakesdale Avenue SW, Renton, WA  
Telephone (206) 296-7112 Facsimile (206) 296-7055

**SUMMARY:**

Department's Preliminary Recommendation:	Approve, subject to conditions
Department's Final Recommendation:	Approve, subject to conditions
Examiner's Decision:	Approve, subject to conditions (modified)

**PRELIMINARY MATTERS:**

Notice of appeal received by Examiner:	September 20, 1998
Statement of appeal received by Examiner:	September 20, 1998

**EXAMINER PROCEEDINGS:**

Pre-Hearing Conference:	December 16, 1998
Hearing Opened:	January 21, 1999
Hearing Continued:	January 28, 1999
Hearing Closed:	January 28, 1999

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

## ISSUES/TOPICS ADDRESSED:

- Access, pedestrian
- Pedestrian trails
- Access, vehicular
- Setbacks
- Walkways
- Code interpretation
- Site distance

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

## FINDINGS:

1. **General Information.**

Owner/Appellant: Eugene Morel, *represented by Joel Haggard*, Attorney At Law  
1200 – 5<sup>th</sup> Avenue, #1200, Seattle, WA 98101  
Location: 2931 East Lake Sammamish Parkway SE  
STR: 07-24-06  
Zoning: R4P  
Community Plan: East Sammamish

2. **Proposal.** Eugene Morel (the “Applicant”) proposes to construct a single-family residence on an interior lot along the east shore of Lake Sammamish. The lot is situated between the shoreline and (former) Burlington Northern Railroad (BNR) right-of-way. Having reviewed the proposed development plans, the Department of Development and Environmental Services (“DDES” or the “Department”) required the Applicant to apply for variances from the single-family residential setback requirements established by KCC 21A.12.030(A) and -.030(B)(8). The proposed site plan is incorporated in this hearing record as exhibit No. 4 (revised site plan dated June 22, 1998). However, that site plan is amended in these ways:

- A. Provision of a hammer-head driveway turn-around, illustrated by Gibson Traffic Consultants as an attachment to the traffic safety study entered as exhibit No. 13 (see attachment C.);
- B. Proposed bollard design (provided as an attachment to exhibit No. 21—letter dated January 26, 1999, from Joel Haggard to the Examiner; see attachment D.);
- C. The Applicant’s testimony that he would be willing to move the garages and workshop at issue westward one to two feet; and,
- D. An offer to record a “hold harmless clause” indemnifying the County from liability due to damage loss or injury resulting from the development as proposed.

3. **Appeal From Administrative Variance Decision.** On September 16, 1998 the Land Use Services Division of the Department of Development and Environmental Services (hereinafter, the “Department” or “DDES”) granted the variance(s) requested by Applicant Morel, subject to six conditions. Because this is a *de novo* review, and because the Department has slightly modified its September 16, 1998 decision, the substance of that administrative decision will be disregarded in these findings in favor of the Department’s final recommendation, described in finding No. 4, below.

Applicant Morel accepts the Department's proposed variance conditions, *except* for these provisions:

- A. The Applicant opposes the Department's variance condition to require "a ten-foot setback for the proposed garage" from the (former) BNR right-of-way.
- B. The Applicant opposes the variance condition which would require a special use permit from the King County Parks Department for access across the (former) BNR right-of-way (which, since the Department's administrative variance decision, has been acquired by the King County Parks Department).
- C. The Applicant agrees to adopt such legal mechanism as may be appropriate to prohibit uses of the proposed hammer-head turn-around that would assure its continued use as now intended.

The Applicant's arguments are twofold:

- First, the Applicant challenges the Department's interpretation that the east boundary of the subject property (common with the west boundary of the inactive railroad right-of-way) is the lot "front" from which front yard setback must be measured. Agreement with this argument would result in a minimum setback (sans variance) of only five feet instead of ten feet (for residential buildings) or twenty feet (for garages).
- Alternatively, the Applicant argues that the proposal is consistent with the criteria for variance contained in Attachment A of this Report and Decision. This argument focuses particularly on the contested aspects of the variance criteria. In particular, the Applicant argues that strict enforcement of the provisions of this title would create an unnecessary hardship to the property owner; that the variance is necessary because of the unique size, shape, topography and location of the subject property; that the subject property is deprived, by provisions of KCC Title 21A, of rights and privileges enjoyed by other properties in the vicinity and under an identical zone; that the variance does not create health and safety hazards; and, that the variance is the minimum necessary to grant relief to the Applicant.

4. **Department's Final Recommendation.** The Department's final recommendation varies slightly from any document contained in the hearing record. Therefore it will be entered in its entirety here. The Department recommends approval of the requested variance, subject to the following conditions:

- A. Building permit No. B97R2322 shall be issued with four years of the transmittal date of the report. Otherwise, this action shall become null and void.
- B. No portion of the upper floor structure lying north of the breezeway shall be located closer than ten feet to the edge of the inactive railroad right-of-way.
- C. Approval of this variance does not authorize any placement of fill, removal of vegetation, and improvement within the inactive railroad right-of-way.
- D. Prior to issuance of the building permit No. B97R2322 the Applicant shall obtain a special use permit (pursuant to KCC 14.03) for the proposed crossing and any other improvements within the inactive railroad right-of-way.

- E. An automatic garage door opener shall be installed on the proposed garage door prior to final inspection.
  - F. The development of this project is subject to all rules, regulations, policies and codes that are not specifically modified by this approval.
  - G. Regardless of the outcome of pending litigation to identify the proper boundary line between the Morel property and abutting (newly acquired) inactive railroad right-of-way property, no change will be allowed or permitted.
5. **Front Property Line.** The north and south Morel property boundaries abut other residential properties. It can be assumed with relative certainty, then, that neither the north nor south boundaries of the subject property comprise the “front” property line. That leaves only two other boundaries to consider: The ordinary high-water line of Lake Sammamish, and the inactive railroad right-of-way now owned by King County Parks Department. There is no indication in the hearing record that the Applicant obtains primary access to the residence via Lake Sammamish surface water. It is reasonable to find, therefore, that the boundary that provides access to the Morel property is the east boundary; that is, the boundary that “fronts” the County Parks Department owned inactive railroad right-of-way and obtains easement access to East Lake Sammamish Parkway Southeast. The interior lot lines thus described indeed conform with the interior lot line definition provided by KCC 21A.06.730.

Previously owned by BNR, the abutting property at issue was recently acquired by the Land Conservancy Trust, the owner at the time of the Morel application for the now appealed administrative variance decision. Shortly thereafter, however, the Land Conservancy Trust sold the property (the inactive railroad right-of-way) to King County Department of Parks. The Parks Department intends to use the approximately eleven mile long right-of-way as the basis for extending its public trails system. However, the Department of Parks concedes that it does not now know the final plan or disposition of the entire eleven mile long property. Although most of it will be developed as public trail for cyclists, pedestrians and equestrians, ownership disputes or other planning criteria may force some portion of the trail to be located along East Lake Sammamish Parkway instead. The County Parks Department cannot now ascertain whether that portion of the inactive railroad right-of-way abutting the Morel property will be developed as public trail or not. Consequently, the King County Parks Department seeks variance conditions which will assure public trail user safety *if* the property actually becomes public trail.

The parties have cited numerous code provisions, the relevant ones of which are addressed in the conclusions below.

6. **Residential Access Safety.** The Applicant retained a qualified traffic engineer to evaluate the safety concerns generated by DDES and the Department of Parks, and to make recommendations. The consultant, Terry L. Gibson, P.E., determined that the garage entry setback recommended by DDES “would actually exacerbate the safety/visibility problems of the driveway design.” Aileen McManus, Senior Engineer, Traffic Engineering Section, King County Department of Transportation, agrees. Observing the changes in grade shown in Mr. Gibson’s analysis, Ms. McManus concludes that, “this does not appear to be a viable alternative.” DDES demurs, arguing that a safe solution with a ten-foot setback would be feasible although more costly. The Applicant argues that the ten-foot setback, if imposed, would require *either* the precarious slopes opposed by both Gibson and McManus, *or* a prohibitively expensive superstructure (presumed necessary to prevent driving/ parking on an open roof above a family room).

7. **Trail Safety.** The Department of Parks, even though it is unsure whether this particular (former) BNR right-of-way segment will be used for trail purposes, seeks to promote or preserve public safety for trail use. The Department of Parks' concerns are twofold. First, there is concern that backing vehicles into the trail may be dangerous to cyclists, equestrians and pedestrians on the trail. Second, as a "rail-bank" property, the Department of Parks is obligated to prohibit or avoid uses of the property which might inhibit future rail use. Regarding the trail user safety concern, consultant Gibson has developed a hammer-head turn-around plan which would increase the visibility of trail users to drivers parking in the Morel property. Regarding the rail-banking concern, the Applicant contends that the Federal Rail Commission requires clearance 8½ feet from rail centerline. The bollards suggested by Gibson would be located 8 feet from center line, presumably a reasonable approximation considering the fact that the record contains no indication that the installation of bollards would be contrary to rail-banking objectives. King County Department of Transportation Engineer, Aileen McManus, in her memorandum of January 7, 1999 (exhibit No. 1, attachment 5) states, "I concur with the Gibson traffic safety study conclusion to provide a hammer-head turn-around between the garage and the trail, but recommend a buffer between the two."
8. **Comparables.** Responding to variance standard KCC 21A.44.030.C, both the Department and the Applicant have offered evidence of similarly situated properties along the east Lake Sammamish shoreline. The Department and the Applicant disagree with respect to various distinctions between and among them. However, due to the tight fit of properties located between the shoreline and the (former) BNR right-of-way, all of the properties were shown to be characterized by unique circumstances not taken into consideration by the regulatory contents of KCC Title 21A.
9. **Department Conclusions Adopted.** In its September 16, 1998 Report, the Department concluded the following:
  - A. The special circumstances applicable to the subject property is (sic) the depth of the lot in relationship to the shoreline and the 100-year floodplain line which has forced development on this site to be located toward the BNR right-of-way.
  - B. The abutment of the BNR right-of-way provides additional light, air, and open space which reduces possible impacts caused by a structure on the front yard setback.
  - C. The granting of the requested variance will not be materially detrimental to the public welfare nor injurious to the property or improvements in the vicinity and zone classification in which the subject property is located *as long as the Applicant complies with the conditions of this approval.* (Emphasis added.)
  - D. Strict application of the zoning code requirements as set forth in KCC 21A.12.030 would deprive the subject owner of rights and privileges (construction of single-family residence) enjoyed by other property owners in the vicinity and under the same zone classification.

## CONCLUSIONS:

1. A lot must have a “front.” It is neither logical nor consistent with the construction of KCC Title 21A to assume a “no-front” lot. We know the side lot lines (interior lot lines) are not the front. Choosing between the lake shore and the driveway shouldn’t be that difficult. There is certainly no argument or evidence in the hearing record to suggest that the lake shore is the front.

KCC 21A.12.110 would have us measure a street setback from the street “right-of-way” (or edge of improved surface, whichever is more near). KCC Title 21A does not define “public right-of-way.” The American Heritage Dictionary of the English language, third edition, does. See attachment B. Among various definitions, it describes right-of-way as “the path or thoroughfare on which . . . passage is made” and “the strip of land over which facilities such as highways, *railroads*, or power lines are built.” (Emphasis added.) American Heritage also defines “thoroughfare.” It defines “thoroughfare” as a general conceptual term, that includes “a place of passage from one location to another.” It certainly need not be applied to any particular category of street. See also attachment B.

Taking all of these factual considerations into account, it would be patently unreasonable to conclude anything other than that the boundary shared by the inactive railroad right-of-way and the Morel property is the “front” of that property. Consequently, the Decision which follows below assumes the minimum front yard setback standards of the R4P zoning classification apply to the building, garage and “workshop” portions of the Morel development proposal.

2. The preponderance of evidence and expert testimony supports the hammer-head design offered by the Applicant as a means of assuring trail user safety. Though one traffic engineer found it less than ideal, both engineers agreed that it provided a viable solution. Further, both engineers agreed that the setback sought by the Department would not result in a viable solution. On this basis, then, the variance may be approved subject to the hammer-head turn-around design.
3. The DDES recommendation, in conjunction with the topographic constraints of the property impose a Hobson’s choice upon the Applicant: Either develop a structurally innovative, expensive and unusual superstructure supporting a driveway above the proposed family room; or, create a garage-access drive with slopes ranging from 0° to 31° gradient, a solution recommended against (for safety reasons) by both traffic engineers.
4. The Applicant concedes that there is one or two feet of building footprint leeway to provide compromise between the topographic constraints of the site and standards of the zoning code as reduced by DDES. The decision that follows below balances this flexibility with the fact that the very minimum setback of the County is five feet.

Because the (former) BNR right-of-way is a Federally rail-banked public utility (see definition in Attachment B), the minimum setback is, at the very least, five feet. KCC 21A.12.140. No variance request from KCC 21A.12.140 has been requested. The purpose of the dimensional standards of KCC 21A.12.10 are not only flexibility as well as privacy, KCC Title 21A’s purpose is stated in KCC 21.02.030, and includes public safety as well as compatibility of adjacent areas. All of these considerations powerfully support the Decision below.

5. Such approval, however, should not be construed as constituting or pre-empting Department of Parks special permit approval for use of its abutting property for the purpose of obtaining access. Due to statutory prohibition of land-locking, it may be assumed that the Department of Parks will indeed grant access to the Morel property. However, the conditions of such access remain to be learned.
6. Provided that the proposed development complies with the conditions of variance approval indicated in the decision which follows below, a variance from the minimum front setback requirements should be granted. Given implementation of those conditions which follow below, the requested variance will be consistent with those variance standards established by KCC 21A.44.030.A through -.030.L.

DECISION:

The variance from the setback standards of the R4P zone classification requested by Gene Morel is APPROVED; SUBJECT to the following conditions:

1. The minimum setback of any portion of the upper floor structure—garage, residence or workshop—shall be five feet from the east boundary of the lot.
- 2A. A hammer-head turn-around shall be installed as indicated in attachment C., before occupancy inspection.
- 2B. Bollards shall be installed as indicated in attachment D., before occupancy inspection.
- 2C. A covenant which prohibits parking or outdoor storage within the hammer-head area shall be recorded before building permit issuance.
3. Approval of this variance does not authorize any alteration or improvement of abutting King County owned property. See also condition No. 4, following.
4. Before building permit issuance, the Applicant shall obtain a special use permit (KCC 14.03) from the King County Department of Parks and Recreation for abutting King County owned property.
5. An automatic garage door opener shall be installed on the proposed garage door before final occupancy inspection.
6. The development of this project is subject to all rules, regulations, policies and codes that are not specifically modified by this approval.
7. There shall be no subsequent modification of structural location following decision or settlement of any litigation regarding disputed boundaries between Applicant Morel and King County.

ORDERED this 4<sup>th</sup> day of February, 1999.

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R. S. Titus, Deputy  
King County Hearing Examiner

TRANSMITTED this 4<sup>th</sup> day of February, 1999, to the following parties and interested persons.

Daryl Deutsch	Steve Negri	Tracy Daniels/DDES
Gene Duvernoy	Kim Schademan	David Eldred/PAO
Terry Gibson	Richard Schroeder	Jennifer Knauer/Parks
Joel Haggard	Charlene Tagas	Aileen McManus/KCDOT
Patrick Lathrop	Fred Wert	Sherie Sabour/DDES
Eugene Morel	Greg Borba/DDES	Michael Salmon/DDES

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding appeals from decision on applications for variance. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JANUARY 21 AND JANUARY 28, 1999, PUBLIC HEARINGS ON DEPARTMENT OF DEVELOPMENT AND LAND USE SERVICES DIVISION FILE NO. L97VA003 – MOREL VARIANCE APPEAL:

R. S. Titus was the Hearing Examiner in this matter. Participating at the hearings were Sheri Sabour, Jennifer Knauer, and Aileen McManus, representing King County; Joel Haggard, Eugene Morel and Terry Gibson.

The following exhibits were offered and entered into the hearing record January 21, 1999:

Exhibit No. 1	Department of Development and Environmental Services, Land Use Services Division report to the Hearing Examiner
Exhibit No. 2	Department of Development and Environmental Services File No. L97VA003
Exhibit No. 3	Zoning Variance Report and Decision dated September 16, 1998
Exhibit No. 4	Revised site plan dated June 22, 1998
Exhibit No. 5	Assessor map 7-24-6
Exhibit No. 6	Boundary Line Adjustment plan No. L97L0049 recorded on November 26, 1997
Exhibit No. 7	Topographic survey of proposed boundary for Mr. Morel
Exhibit No. 8	Revised site plan submitted by Applicant
Exhibit No. 9	A. Photograph of existing driveway B. Photograph of Burlington Northern right of way
Exhibit No. 10	A. Photograph of Buck house B. William Sanders house
Exhibit No. 11	A, B, & C - Photographs from existing proposed garage site
Exhibit No. 12	A, B & C - Photographs from garage site if location lowered
Exhibit No. 13	Traffic safety study for garage access dated December 18, 1998, prepared by Gibson Traffic Consultants

The following exhibits were offered and entered into the hearing schedule January 28, 1999:

Exhibit No. 14	Zoning Variance Report and Decision dated September 11, 1992, File No. L92VA017 Dean Scott
Exhibit No. 15	Zoning Variance Report and Decision dated July 14, 1994, File No. L94VA018 Howard and Colleen Buck
Exhibit No. 16	Zoning Variance Report and Decision dated December 21, 1994, File No. L94VA044 Willis E. Sander
Exhibit No. 17	Zoning Variance Report and Decision dated May 29, 1997, File No. L96VA017 Jay Patterson
Exhibit No. 18	Jennifer Knauer (Parks) hearing testimony outline
Exhibit No. 19	A, B, & C – Photographs submitted by Applicant/Appellant
Exhibit No. 20	Assessor's map 7-24-6 with Buck residence marked
Exhibit No. 21	Letter dated January 26, 1999, from Joel Haggard to Examiner